(2)

No. 98-1983

In the Supreme Court of the United States

VINCENT GIGANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the presentation of a witness's testimony from a remote location by two-way closed circuit television violated petitioner's rights under the Confrontation Clause of the Sixth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 166 F.3d 75. The memorandum and order of the district court (Pet. App. B24-B33) is reported at 971 F. Supp. 755.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1999. A petition for rehearing was denied on March 11, 1999 (Pet. App. A22-A23). The petition for a writ of certiorari was filed on June 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted of conducting the affairs of a criminal enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c), and conspiring to do so, in violation of 18 U.S.C. 1962(d). In addition, petitioner was convicted of conspiring to commit murder in aid of racketeering activity, in violation of 18 U.S.C. 1959(a)(5); conspiring to commit extortion, in violation of 18 U.S.C. 1951; and conspiring to make payoffs to officers of a labor organization, in violation of 18 U.S.C. 371 and 29 U.S.C. 186(a)(4). He was sentenced to twelve years' imprisonment to be followed by five years of supervised release, and was fined $1,250,000. Pet. App. A1-A5.

1. Petitioner was the head of the Genovese organized crime family in New York City. Along with the heads of the four other organized crime families in New York City, petitioner was a member of the Commission, a body that governs La Cosa Nostra families throughout the United States. See Pet. App. A3-A4. In an attempt to deflect law enforcement scrutiny, petitioner deliberately engaged in public displays of bizarre behavior, such as appearing in public while wearing his bathrobe and pajamas, to make it appear that he was mentally unstable. See *id.* at A4-A5, A19-A20.

Petitioner and Vittorio "Vic" Amuso, the head of the Luchese family, were centrally involved in a scheme to control the multi-million dollar window replacement business in New York City. They carried out the scheme through the Genovese family's control of window replacement companies, which made labor payoffs to the window replacement union that the Luchese

family controlled. In exchange for bribery payments to corrupt union officials, the Genovese family's companies were allowed to circumvent costly union rules and to hire less expensive non-union workers. When other companies successfully bid on jobs, union representatives would persuade them to withdraw their bids through coercive means. Pet. App. A4; Gov't C.A. Br. 23-29.

As the boss of the Genovese family, petitioner was also part of a conspiracy to murder John Gotti, the boss of the Gambino family. Gotti became the boss of the Gambino family after he arranged the assassination of his predecessor, Paul Castellano. Because Gotti had killed a family boss without obtaining permission from the Commission, petitioner and his counterparts plotted to kill Gotti. Gotti, however, was arrested before the plot could be carried out.[1] Pet. App. A5; Gov't C.A. Br. 18-23.

Petitioner also conspired to murder Peter Savino, an associate of the Genovese family. Petitioner correctly believed that Savino had begun cooperating with law enforcement agents, and it was petitioner's responsibility to eliminate Savino as a potential witness. The plan to kill Savino did not succeed, however, because Savino entered the Witness Protection Program and petitioner

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[1] The jury found petitioner guilty of conspiring to murder Gotti, but the district court dismissed the count on statute of limitations grounds. *United States* v. *Gigante*, 982 F. Supp. 140, 158-159 (E.D.N.Y. 1997). The conspiracy to murder Gotti was also charged as a predicate racketeering act in the RICO counts, and the jury found that act to have been proven. Because the predicate act fell within the applicable statute of limitations for the RICO counts, it supported petitioner's convictions on the RICO counts. *Ibid.*

was unable to locate him. Pet. App. A5; Gov't C.A. Br. 30-33.

2. At trial, Savino testified about petitioner's involvement in the window replacement scheme. Pet. App. A6. Savino, who was still participating in the Witness Protection Program, testified from a remote location by way of a live two-way closed circuit television procedure that allowed Savino to view and hear petitioner and counsel while simultaneously allowing petitioner, counsel, the judge, and the jury to view and hear Savino. *Id.* at B25.

That procedure resulted from the district court's grant of the government's pre-trial application to permit Savino to testify through a two-way closed circuit television procedure because of Savino's terminal illness. Savino was then in the final stages of an inoperable, fatal cancer and was under medical supervision at an undisclosed location.[2] Pet. App. A6-A7. After a hearing, the court found that "[m]edical reports and testimony for the government and [petitioner] fully supported the government's contention, by clear and convincing proof, that the witness could not appear in court." *Id.* at B24-B25.

The district court described the issue before it as one "of apparent first impression in the federal courts." Pet. App. B24. The court concluded that it had "inherent power" under Federal Rules of Criminal Procedure 2 and 57 to order contemporaneous televised testimony. Pet. App. B30. "Since the Rules of Criminal Procedure do not speak specifically to this matter," the court concluded that it was "permitted to draw from and mirror a practice that is sanctioned" by Federal Rule of Civil

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[2] Savino died on September 30, 1997, approximately two months after he testified. See Gov't C.A. Br. 35.

Procedure 43.[3] *Ibid.* The court also found that the government had made "the threshold showing entitling it to a deposition" under Federal Rule of Criminal Procedure 15, but that a deposition was "not appropriate" because of Savino's secret location and petitioner's own ill health and inability to travel. *Id.* at B31-B32. The court concluded that "[r]eceiving contemporaneous testimony via closed circuit televising affords greater protection of [petitioner's] confrontation rights than would a deposition." *Id.* at B32.

The district court rejected petitioner's claim that allowing Savino to testify by two-way closed circuit television would violate his rights under the Confrontation Clause of the Sixth Amendment. The court noted that "[t]he televising arrangements made by the government provide * * * full confrontation since the witness sees and hears [petitioner] while [petitioner] sees and hears the witness. The jury, court, and counsel simultaneously see both." Pet. App. B32. The court thus concluded that "the arrangements proposed by the government in this case satisfy fully the requirements of the Constitution and the Federal Rules of Criminal Procedure." *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A21. It held that "under the circumstances of this case, the procedures by which Savino testified did not violate [petitioner's] confrontation rights." *Id.* at A6. The court rejected petitioner's argument that the use of two-way closed circuit television in this case was uncon-

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[3] Federal Rule of Civil Procedure 43 was amended in 1996 to provide that "[t]he court may, for good cause shown and in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location."

stitutional under this Court's decision in *Maryland* v. *Craig*, 497 U.S. 836 (1990), because the government had failed to show that the procedure was necessary to further an important public policy. Pet. App. A10. The court observed that the standard applied in *Craig* was designed "to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant." *Ibid.* In this case, however, the district court "employed a two-way system that preserved the face-to-face confrontation." *Ibid.* Accordingly, the court determined that the *Craig* standard did not apply to the televised testimony in this case. *Ibid.*

Noting that the district court had found that the government had made the threshold showing that would have been required for a deposition under Rule 15, Pet. App. A11, the court of appeals agreed with the district court that "the closed-circuit presentation of Savino's testimony afforded greater protection of [petitioner's] confrontation rights than would have been provided by a Rule 15 deposition." *Id.* at A12. Because the use of two-way closed circuit televised testimony "may provide at least as great protection of confrontation rights as Rule 15," the court "decline[d] to adopt a stricter standard for its use than the standard articulated by Rule 15." *Id.* at A13. The court made clear that "[c]losed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness." *Id.* at A12. It concluded, however, that "[u]pon a finding of exceptional circumstances, * * * a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." *Ibid.* The court ruled that "[t]he facts of Savino's fatal illness and participation in the Federal Witness Protection Program, coupled with [petitioner's] own inability to participate in a distant

deposition, satisf[ied] this exceptional circumstances requirement." *Ibid.*

ARGUMENT

Petitioner contends that he was denied his Sixth Amendment right to confrontation when the district court allowed Savino to testify at trial by two-way closed circuit television. See Pet. 8-20. That contention lacks merit and does not warrant this Court's review.

1. This Court has explained that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland* v. *Craig*, 497 U.S. 836, 845 (1990). In this case, the court of appeals correctly observed that the procedure used for Savino's testimony preserved the central characteristics of face-to-face confrontation of a witness who gives live testimony in court: "Savino was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and Savino gave this testimony under the eye of [petitioner] himself." Pet. App. A9. Thus, Savino's testimony was subject to "rigorous testing" as required by the Confrontation Clause. *Craig*, 497 U.S. at 845.

Contrary to petitioner's assertions (Pet. 8-15), the court of appeals' decision in this case does not conflict with this Court's decisions in *Coy* v. *Iowa*, 487 U.S. 1012 (1988), and *Maryland* v. *Craig*. In *Coy*, this Court held that the defendant's right to confrontation was violated when two children he was alleged to have sexually assaulted were allowed to testify against him from behind a screen that prevented them from seeing the defendant. 487 U.S. at 1021. The Court noted that "[t]he screen at issue was specifically designed to

enable the complaining witnesses to avoid viewing [the defendant] as they gave their testimony, and the record indicate[d] that it was successful in this objective." *Id.* at 1020. *Coy* held that such complete absence of confrontation, when not accompanied by any "individualized findings that [the] particular [child] witnesses needed special protection," could not be upheld. *Id.* at 1021.

Two years later, the Court made clear in *Craig* that the Confrontation Clause does not guarantee defendants "the *absolute* right to a face-to-face meeting with witnesses against them at trial." 497 U.S. at 844. While "reaffirm[ing] the importance of face-to-face confrontation," the Court declined to "say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Id.* at 849-850. The Court in *Craig* then upheld the use of one-way closed circuit television for the testimony of a child in a child abuse case. The Court held that the procedure did not violate the defendant's right to confront witnesses against him because it was necessary to further an important state interest in preventing trauma to child witnesses in child abuse cases, and because the trial court had made a specific finding that the procedure was necessary to protect the welfare of the particular child witness in that case. *Id.* at 850-857.

The two-way closed circuit television procedure in this case is significantly different from the procedures at issue in *Coy* and *Craig*. The witnesses in *Coy* were concealed by a screen and did not have any opportunity to see the defendant while testifying. The witness in *Craig*, while testifying under televised procedures that did comply with the Confrontation Clause, also could not see the defendant while testifying. In this case, however, Savino and petitioner were able to see each

other on two-way television throughout Savino's testimony.[4] Thus, the court of appeals correctly concluded that the two-way closed circuit television procedure used in this case was not subject to the same constitutional test applied by this Court in *Craig* for the use of one-way closed circuit television. Pet. App. A10. In *Craig*, the Court required a showing that one-way closed circuit television was "necessary to further an important state interest." 497 U.S. at 852. As the court of appeals explained, that standard was crafted "to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant." Pet. App. A10. Here, because Savino and petitioner were able to see each other throughout Savino's testimony, "face-to-face confrontation at trial" was not "absent" in the same sense as in *Craig*.[5]

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[4] Petitioner's contention does not rest on any claim that Savino could not see him while testifying. The court of appeals noted that there was "some dispute over whether Savino could see petitioner himself in the background of his monitor," but found it "clear that [the district court] afforded defense counsel the opportunity to place [petitioner's] televised visage squarely before Savino." Pet. App. A9 n.1. The court of appeals properly concluded that petitioner waived any claim of error with respect to that issue.

[5] The facts in this case are also unlike the facts that led to Justice Scalia's opinion, in which Justice Thomas joined, dissenting from the denial of certiorari in *Danner* v. *Kentucky*, 119 S. Ct. 529 (1998). The state statute at issue in that case, Ky. Rev. Stat. Ann. § 421.350(2) (Michie 1992), permitted transmitting the out-of-court testimony of certain child witnesses by *one-way* closed circuit television, so that the defendant could see the witness but the witness could not see the defendant. The case involved the prosecution of a father for raping and sodomizing his daughter, who was 15 years old at the time of trial and who "vaguely protested" that she could not be near her father. 119 S. Ct. at 529. Justice Scalia believed that the case came "nowhere close to fitting within *Craig*'s limited

The court of appeals correctly found, instead, that the "exceptional circumstances" of this case warranted using two-way closed circuit television for Savino's testimony. Pet. App. A13. Petitioner does not dispute that the district court could have ordered Savino's deposition under Federal Rule of Criminal Procedure 15, which authorizes taking a deposition "[w]henever due to exceptional circumstances of the case it is in the interest of justice" to do so. Fed. R. Crim. P. 15(a).[6] As the court of appeals recognized, Savino was "unavailable" within the meaning of Rule 15 because of his extremely poor health. Pet. App. A10-A13; see *United States* v. *Donaldson*, 978 F.2d 381, 392-393 (7th Cir. 1992) (witness who was seriously ill at the time of trial was sufficiently unavailable to warrant a Rule 15 deposition); *United States* v. *Campbell*, 845 F.2d 1374, 1377-1378 (6th Cir.) (infirmity of elderly witness is an exceptional circumstance justifying the use of deposition testimony at trial), cert. denied, 488 U.S. 908 (1988). Savino's testimony therefore could have been

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exception" for the use of one-way closed circuit television. *Id.* at 530.

[6] Rule 15 permits the taking of a deposition "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial." Fed. R. Crim. P. 15(a). Such testimony may then be used at trial "as substantive evidence if the witness is unavailable." Fed. R. Crim. P. 15(e). Rule 15(e) adopts the definition of unavailability contained in Federal Rule of Evidence 804(a). That Rule defines "unavailability of a witness" to include situations in which the witness "is unable to be present or to testify at the hearing because of * * * then existing physical or mental illness or infirmity." Fed. R. Evid. 804(a)(4). Rule 15 is not identical to the procedure analyzed in this case, since the Rule contemplates the defendant's presence during the examination unless the defendant waives that right in writing. Fed. R. Crim. P. 15(b).

taken by deposition and introduced at trial as "substantive evidence." Fed. R. Crim. P. 15(e). The district court ultimately deemed a deposition inappropriate, in part because petitioner conceded that his own poor health precluded him from traveling to the scene of a deposition. Pet. App. B31-B32. Given the "exceptional circumstances" of Savino's unavailability, the district court properly permitted Savino to testify via two-way closed circuit television instead.

As the court of appeals further determined, "the closed-circuit presentation of Savino's testimony afforded greater protection of [petitioner's] confrontation rights than would have been provided by a Rule 15 deposition." First, it "forced Savino to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment." Second, it "allowed [petitioner's] attorney to weigh the impact of Savino's direct testimony on the jury as he crafted a cross-examination." Pet. App. A12. Thus, since a Rule 15 deposition would have been permissible in this case, and since the use of two-way closed circuit televison was actually more protective of petitioner's Confrontation Clause rights, Savino's televised testimony did not violate petitioner's right to confrontation.[7]

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[7] Indeed, although the court of appeals found it inappropriate to apply the *Craig* standard, the application of that standard would not make a difference on the facts of this case. As a prerequisite for using one-way closed circuit television, *Craig* requires a showing of an important public interest and the existence of alternative assurances of reliability. Here, presenting the televised testimony of a crucial witness against petitioner in an alleged conspiracy to murder served important public interests, where the witness's health precluded his live in-court testimony And the two-way television procedure afforded adversarial testing that provided virtually as great assurances of reliability as actual in-court testi-

2. There is no merit in petitioner's claim (Pet. 17) that the decision in this case creates a conflict among the federal courts of appeals. Several courts of appeals have analyzed 18 U.S.C. 3509, which was enacted after this Court's decision in *Craig* and establishes procedures for allowing alternatives to live in-court testimony by child victims, in light of *Craig* itself.[8] See *United States* v. *Moses*, 137 F.3d 894, 897-898 (6th Cir. 1998); *United States* v. *Weekley*, 130 F.3d 747, 752-753 (6th Cir. 1997); *United States* v. *Miguel*, 111 F.3d 666, 669-671 (9th Cir. 1997); *United States* v. *Carrier*, 9 F.3d 867, 869-870 (10th Cir. 1993), cert. denied, 511 U.S. 1044 (1994); *United States* v. *Garcia*, 7 F.3d 885, 887-888 (9th Cir. 1993). All of those cases, however, involved interpretation and application of 18 U.S.C. 3509. Reading Section 3509 as a legislative response to *Craig*, each of those cases upheld the use of two-way closed circuit television for the testimony of a child witness as permissible under Section 3509 and *Craig*. None of those cases addressed whether the test for using two-way closed circuit television might be different in the absence of a federal statute specifying the criteria to be met. Thus, the court of appeals' decision in this case

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mony. The court of appeals' findings that closed circuit televised testimony should not be a "commonplace" occurrence, but was justified here by "exceptional circumstances" and allowed adequate testing of the witness's "credibility through his demeanor and comportment," Pet. App. A12-A13, are essentially equivalent to the findings needed to meet the *Craig* test.

[8] Section 3509(b)(1) sets forth a procedure for taking the testimony of a child victim outside the courtroom and televising it by two-way closed circuit television; Section 3509(b)(2) sets forth a procedure for taking a videotaped deposition of the testimony of a child victim.

rests on principles that were not at issue in those cases.[9]

3. In any event, this case is not a suitable vehicle for deciding the circumstances under which a witness's testimony by two-way closed circuit television is consistent with a defendant's right to confront his accusers. In order to reach that question here, this Court would first have to decide whether petitioner waived his right to confront Savino at trial. The court of appeals "note[d] the government's argument that [petitioner] waived his right to confront Savino," but concluded it

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[9] The state cases upon which petitioner relies (Pet. 17-18) likewise do not conflict with the court of appeals' decision. For the most part, those cases merely addressed the question of whether a child witness's testimony by closed circuit television was consistent with this Court's decision in *Craig*. See *Marx* v. *State*, 987 S.W.2d 577, 578-581 (Tex. Crim. App. 1999) (en banc); *Gonzalez* v. *State*, 818 S.W.2d 756, 759-762 (Tex. Crim. App. 1991) (en banc); *In re Howard*, 694 N.E.2d 488, 490-491 (Ohio Ct. App. 1997); *State* v. *Wright*, 690 So. 2d 850, 851-853 (La. Ct. App. 1997); *People* v. *Vanidestine*, 463 N.W.2d 225, 226-228 (Mich. Ct. App. 1990); *People* v. *Guce*, 560 N.Y.S.2d 53 (1990).

As petitioner notes (Pet. 18), the state court in *Harrell* v. *State*, 709 So. 2d 1364, 1368 (Fla.), cert. denied, 119 S. Ct. 236 (1998), declined to find that a two-way closed circuit television procedure was "the equivalent" of physical, face-to-face confrontation. The court in *Harrell* was "unwilling to develop a per se rule that would allow the vital fabric of physical presence in the trial process to be replaced at any time by an image on a screen." *Ibid.* The court, however, went on to hold that the admission of trial testimony by two-way closed circuit television did not violate the Confrontation Clause when the witness resided in a foreign country and was unable to appear in court. *Id.* at 1369-1372. Like the court of appeals here, the state court in *Harrell* analogized the two-way closed circuit television procedure to the procedure for taking depositions. *Id.* at 1370; see also *State* v. *Sewell*, 595 N.W.2d 207, 212-214 (Minn. Ct. App. 1999).

"need not resolve these questions relating to possible waiver * * * because [petitioner's] claim fails on the merits."[10] Pet. App. A6. It is thus quite possible that the question on which petitioner seeks review would have no relevance to the ultimate outcome of this case.[11]

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[10] The government argued below that petitioner had waived his right to confront Savino for two reasons. First, petitioner waived his challenge to the use of the two-way closed circuit television procedure because he rejected the alternative of taking Savino's deposition under Rule 15. Gov't C.A. Br. 40-45. The district court noted that petitioner "concede[d] that his own purported poor health preclude[d] his traveling to the deposition and *he prefer[red] televised presentation of live testimony to a deposition.*" Pet. App. B32 (emphasis added). Second, petitioner waived his right to confront Savino by deliberately attempting to delay the prosecution over the course of more than seven years in an effort to weaken the government's case through a loss of its witnesses. Gov't C.A. Br. 45-51. By feigning mental incompetence, for example, petitioner obtained a severance of his case from that of his co-defendants, all of whom were tried in 1991. See *Gigante*, 982 F. Supp. at 146-148.

[11] Furthermore, since Savino's death renders him an "unavailable" witness under Federal Rule of Evidence 804(a)(4), on retrial the government would have to either forgo presenting his testimony altogether, or introduce a videotape of his original testimony as permitted by Federal Rule of Evidence 804(b)(1). Certainly the original procedure, where Savino testified live under the scrutiny of petitioner and the jury, and where petitioner had full opportunity to cross examine Savino, was as protective of petitioner's right to confrontation as would be the introduction of Savino's taped testimony on retrial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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